Supreme Court, U.S.
FILED

001160 OCT 23 2000

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~~No. 99-3451~~

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERTA S. SALMON,
Petitioner,

versus

WEST CLARK COMMUNITY SCHOOLS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED FOR REVIEW

A. Whether in an ADA case, in which the petitioner clearly has an interest in a job compatible with her disability, does the misstatement of material facts in the case constitute an error which, if not corrected at the appellate level, denies the petitioner due process under the Fourteenth Amendment of the United States Constitution.

B. Whether in an ADA case, when a specific job can result in the success or the failure of the disabled in the workplace, does a misapplication of the principles of summary judgment constitute a denial of due process under the Fourteenth Amendment of the United States Constitution.

C. Whether the disposition and operation of the Court created a hostile environment, prejudicial to the petitioner, which curtailed discovery and thereby denied due process under the Fourteenth Amendment of the United States Constitution.

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OPINION BELOW

On July 25, 2000 the Court of Appeals for the Seventh Circuit entered an opinion (CA No. 99-3451) affirming the entry of summary judgment of the United States District Court for the Southern District of Indiana, New Albany Division in "*Salmon* v. *West Clark Community Schools*" (D.C. No. 98-170-C-B/S).

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254 and 42 United States Code, Sec. 12201; 12112, *et seq.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions:

1. United States Constitution Amendment 14

B. Statutory Provisions:

1. 42 United States Code, Sec. 12201, *et seq.*
2. 28 United States Code, Sec. 455

STATEMENT OF THE CASE

On March 6, 1998 the Petitioner met with her employers to make them aware of a medical condition which affected her employment and which qualified her as disabled under the ADA.

At the time of the March 6, 1998 meeting the Petitioner was a secondary teacher and gifted talented coordinator for the West Clark Community Schools Corporation.

The Petitioner had been employed in the position for six years.

After the March 6, 1998 meeting the Petitioner's employers responded to the disclosure of her disability by taking her junior high teaching job from her and reassigning her to an elementary teaching job.

At the March 6, 1998 meeting the Petitioner communicated the inappropriateness of an elementary assignment due to the limitations imposed by her disability.

The Petitioner tried repeatedly throughout the summer of 1998 to get her employers to meet with her to discuss in detail her disability-imposed limitations relative to teaching in an elementary classroom.

After the March 6, 1998 meeting the Petitioner's employers refused to meet with her.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals for Seventh Circuit has sanctioned an order involving an important federal question which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rules of Supreme Court 10 (a).

The Seventh Circuit Court of Appeals makes only two points in support of Chief Judge, Sarah Evans Barker's summary judgment. Each point is a restatement of a point made by Judge Barker. Each point is materially in error.

1. The Court, in a footnote, sets aside the question of whether driving is an accommodative issue under the ADA, but in the text of its argument the Seventh Circuit discusses driving, at length, and finally ties the issue to Salmon's utterance," . . . that would be fine." Salmon Dep. 68.

However, an examination of the context of this statement shows what was under consideration when this consent occurred and actually what Salmon was finally agreeing to was the junior high senior high split assignment which Superintendent Smith took to the May 14, 1998 School Board meeting.

2. Secondly, the Seventh Circuit contends that Salmon was largely relieved of any monitoring or supervisory duties with respect to the extra duties of the elementary school teacher.

In fact, Salmon was never removed from Henryville Elementary's duty roster. Smith even acknowledges he was aware the Petitioner was assigned elementary duties. Smith Dep. 112: 10-16.

The Seventh Circuit Court of Appeals adopts Chief Judge Barker's "characteristically thorough opinion" that stated

facts, material to the case, which are in dispute in the record.

3. Barker clearly contends the Board unanimously accepted Smith's recommendation to assign Salmon to a full time teaching position at Henryville Elementary with a classroom aide. Barker at pg. 10, para. 2. (Appendix 22a).

Salmon did not begin the '98-'99 school year with a classroom aide and the School Board made no provision for such a person according to the minutes of its June 11, 1998 meeting. (Appendix 20a).

4. Barker paints the picture of an interactive process continuing after the March 6, 1998 meeting. Barker at pg. 7, para. 3. (Appendix 20a).

In fact, there were no meetings with the Petitioner after the March 6, 1998 meeting according to Smith. Smith Dep. 39:18-40:2.

5. Barker bolsters the image of accommodation by claiming that once the School investigated "non-driving" teaching assignments it located a vacancy at Henryville Elementary. Barker at pg. 41, para. 2. (Appendix 46a).

However, Barker notes that at the May 14,1998 School Board meeting the Board discussed assigning "Salmon" to another job. Barker at pg. 6, para. 2. (Appendix 19a).

Also it was at this meeting the Board "located" a vacancy at Henryville Elementary. Barker at pg. 38, Ft Nt 7. (Appendix 43a).

6. Thus, the chronology of events clearly demonstrates there was no purposeful intent on the part of the School Board to locate a placement for the Petitioner which better suited her needs as a result of her disability.

Smith went to the May 14, 1998 Board meeting ready to recommend the Petitioner's transfer to a junior high-senior high split assignment. Smith Dep. 44:16-17.

At this meeting an elementary principal (not on the agenda) spoke up and informed the Board he had an opening at Henryville Elementary for the Petitioner to fill. Smith Dep. 45:8-13., Barker at pg. 38, Ft Nt 7. (Appendix 43a).

The elementary principal's action challenged Smith's recommendation of a secondary placement for the Petitioner and tabled this option. Smith Dep. 46:21-47:4., School Board minutes of May 14, 1998. (Appendix 5a).

By the next meeting of the School Board, June 11, 1998, Smith completely reversed himself and recommended the transfer of the Petitioner to an elementary assignment at Henryville. (Appendix 2a).

Thus, the record is clear that the discussion at the May 14, 1998 Board Meeting was not about a placement for the Petitioner that best suited her disability. The discussion was entirely about the needs of the School Corporation-should the Petitioner be removed from her current job assignment.

7. Barker argues that the elementary assignment was reasonable because it avoided the creation of a new assignment and unnecessary spending. Barker at pg. 41, para. 2. (Appendix 46a).

Barker is making the argument that any additional spending is unnecessary spending. But this is not the standard set out in the legislation which imposes a potential fiscal burden upon the employer. See *Nelson* v. *Thornburgh*, 567 F. Supp. 369, 379, 380.

Nelson states some of the factors which must be considered if an employer is given relief from his ADA responsibilities because of an "undue burden". Among these factors is the overall size of the recipient's program with respect to size of budget and the nature and cost of the accommodation needed.

Barker never explains how it is more cost effective for the Petitioner to teach elementary students. In fact, the as-

signment of the Petitioner to teach junior high students was a scheduling and logistics problem for the school corporation, not a cost problem.

The new assignment that Barker said the Board avoided "creating" was, in fact, "created" according to the June 11, 1998 School Board minutes, and this new junior high teaching position was given to another teacher (who also holds an elementary license). (Appendix 2a).

8. Barker's assertion that the School Corporation was making a good faith effort to accommodate the Petitioner's disability is valid only if the School Corporation discussed this new junior high opening with the Petitioner.

Barker noted that the School Corporation understood before the beginning of the '98-'99 school year the Petitioner would agree to a solution in which she would teach part-time until a full-time 'secondary' level position would become available." Barker at pg. 12, para. 1. (Appendix 23a).

Joyce Wiseman, ISTA Uniserve Director (teachers' union) in a letter dated July 23, 1998 requested consideration for the Petitioner along these lines. (Appendix C).

The West Clark Community Schools' response was delivered in a letter dated July 27, 1998 in which Smith states the School Corporation had decided to defend all actions." (Appendix D). Note the c.c. on each letter to Chuck Rubright at Bose, McKinney & Evans (law firm) at this early date.

In fact, after the March 6, 1998 meeting the School Corporation refused to meet with the Petitioner to discuss her teaching assignment for the following school year. Smith Dep. 75:21-76:5.

The West Clark Community School Corporation was not promptly responding to the urgent pleas of a disabled employee, as Judge Barker concludes. Instead, the School Corporation was urgently responding in an attempt to turn the Petitioner's claim of failure to accommodate a junior

high teaching assignment into a question of how to accommodate the Petitioner as an elementary teacher.

B. The Court of Appeals for Seventh Circuit has sanctioned an order involving an important federal question which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rules of Supreme Court 10(a).

The Seventh Circuit Court of Appeals declined to apply the principles of summary judgment, as developed through federal case law, to Judge Sarah Evans Barker's summary judgment.

1. A Court must draw all reasonable inferences in the light most favorable to the non-movant. See *Spraying Sys. Co.* v. *Delavan, Inc.*, 975 F. 2d 387, 392.

2. In cases such as this, the criteria associated with summary judgment must be applied with ". . . added scrutiny because matters of intent and credibility are crucial issues." *Doe* v. *R.R. Donnelley & Sons Co.*, 42 F. 3d 439,443; *Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F. 3d 878, 883.

3. Employment discrimination cases are amenable to disposition by summary judgment so long as there is no genuine dispute as to the material facts. *Patterson* v. *Chicago Assoc. for Retarded Citizens*, 150 F. 3 d 719, 723.

4. Barker appears to be confused about the Petitioner's deposition, but instead of seeking clarification, Barker analyzes the Petitioner's remarks with the presumption that the Petitioner ". . . disliked" the elementary setting. Barker at pg. 25, para. 3; pg. 26, para. 1. (Appendix 34a).

Barker even second-guesses the Petitioner's motive for bringing forth her claim, suggesting there was something sinister about the Petitioner's disclosure of her disability. Barker at pg. 22, para. 3. (Appendix 32a).

For these reasons alone the Seventh Circuit Court of Appeals should have applied the standard set forth in *Susie*

v. *Apple Tree Preschool & Child Care Center,* 866 F. Supp. 390, 397:

> ". . . issues of an employer's motivation in discharging an employee — often riddled with subtleties and nuances from which vastly different conclusions may be drawn — are particularly well suited for determination by the ultimate trier of fact — in this case, a jury."

C. The Court of Appeals for the Seventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Rules of Supreme Court 10(c).

The Seventh Circuit Court of Appeals' contention that

> ". . . although Salmon suggests that she neither needed nor requested any immediate change in her teaching assignment . . . the undisputed evidence in the record belies this characterization of the facts," (Posner at pg. 2, para. 2). (Appendix 12a).

reflects the degree to which the Seventh Circuit was swayed by the disposition of the lower court and the counsel for the Defendant-Appellee while denying the Petitioner a voice in the process.

In fact this impression of the Seventh Circuit is a toned-down restatement of an accusation by Wheeler (Bose, McKinney & Evans) in which he accuses the Petitioner of lying and attempting to rewrite the record. Wheeler's Brief of Defendant-Appellee West Clark Community Schools. pg. 14, para. 2.

I. Wheeler accuses Salmon of being dishonest in claiming she could have continued in her junior high/gifted talented position because she had told her employer "she could not drive."

2. But it was Wheeler's own line of questioning that demonstrated the Petitioner was expressing concern with

the progressive nature of her disability at the March 6, 1998 meeting. There was no immediate problem with the Petitioner's driving. Salmon Dep. 67:25-68:8

This part of the record is wholly consistent with the Petitioner's assertion that she did not seek an "immediate" change in her teaching assignment at the March 6, 1998 meeting.

Barker expresses a disdain for the ADA and the disabled who would appear in her court when she opines: "It does not take much for an employee to activate an employer's potential liability under the ADA . . ." Barker at pg. 20, para. 1. (Appendix 30a).

Barker acknowledges that the Petitioner's physician (Lowenthal) recommended a junior high placement as an appropriate teaching assignment given her disability.

However, Barker claims that the recommendation is the result of "Salmon's own unsubstantiated and self-serving representations. Barker at pg. 11, Ft Nt 2. (Appendix 22a).

Barker's lack of objectivity in these proceedings is evident when she describes the Petitioner's disability as a tool of opportunism. Barker at pg. 19, para. 2. (Appendix 29a).

Again Barker is adamant that there is no possible disparate treatment claim that the Petitioner could make that would be looked on favorably by her court. Barker at pg. 42, Ft Nt 9. (Appendix 47a).

Before this case the Petitioner was unknown to Judge Sarah Evans Barker. Judge Barker had, however practiced as a partner in the law firm of Bose, Mckinney and Evans, the law firm representing West Clark Community Schools.

Because Barker chose not to disclose this prior relationship (as would have been prudent under 28 U.S.C. Sec. 455) her judgment, to the Petitioner, is partial for the defendant.

The Seventh Circuit Court of Appeals required oral argument of the case, but declined to respond to the oral arguments or to any of the issues of law brought by Plaintiff's counsel.

For all the legal posturing, the judicial result through the appellate level was to leave a legally blind teacher to her own resources in providing sound education and safety of elementary school children.

CONCLUSION

The Petitioner approached her employer out of concern for needs of public school children. Because the Petitioner's employer assigned her to a job even more difficult for a visually impaired teacher, the needs of those students are still not being met.

The courts have participated in the diminution of the ADA in this case by denying the Petitioner due process and an opportunity to pursue the discovery necessary to ascertain the accuracy of the material facts in question.

For this and all the foregoing reasons, the Petitioner respectfully submits that the petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served upon the following counsel by United States mail, postage prepaid, first class, this _____ day of _____ 2001:

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